

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
JAMES R. BAILEY, dba  
BAILEY SEWER & SEPTIC,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB No. 85-104

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a Notice and Order of Civil Penalty of \$100 for unlawful burning (an unpermitted outdoor fire other than land clearing without prior written approval) came on for hearing before the Pollution Control Hearings Board at Lacey, Washington, on October 24, 1985. Hearing the case were Wick Dufford and Lawrence J. Faulk (presiding). Respondent agency elected a formal hearing, pursuant to RCW 43.21B.230 and WAC 371-08-155. Nancy A. Miller of Robert H. Lewis & Associates reported the proceedings.

Appellant was represented by James R. Bailey, Owner of

1 Bailey Sewer & Septic Co. Respondent agency was represented by its  
2 legal counsel Keith D. McGoffin.

3 Witnesses were sworn and testified. Exhibits were admitted and  
4 examined. Argument was heard. From the testimony, evidence, and  
5 contentions of the parties, the Board makes these

6 FINDINGS OF FACT

7 I

8 Respondent, Puget Sound Air Pollution Control Agency (PSAPCA), is  
9 a municipal corporation with authority to conduct a program of air  
10 pollution prevention and control within the area of its jurisdiction.  
11 That area includes the site of the event under appeal.

12 PSAPCA, pursuant to RCW 43.21B.260, has filed with the Board a  
13 certified copy of its regulations and all amendments to them. We take  
14 official notice of these regulations.

15 II

16 Appellant, Bailey Sewer & Septic Co., operates a septic tank  
17 cleaning and dumping service in Pierce County, Washington.

18 II

19 On May 2, 1985, at about 3:33 p.m., PSAPCA's inspector while on  
20 routine patrol noticed dark smoke rising from an outdoor fire near  
21 Bailey Sewer and Septic Co., located at 10628 9th Avenue Court East,  
22 Tacoma, Washington. The inspector drove to this location and made an  
23 inspection of the outdoor fire causing the smoke. The fire was four  
24 feet in diameter by one foot high. It contained untreated lumber and  
25 metal.

26 Final Findings of Fact,  
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III

The inspector came to the conclusion that the fire was located on property owned by appellant. He based his opinion on his observations and on a review of the county assessor's records. Appellant's office, shop and equipment are located on a piece of property accessible only from 104th Street East and at the end of a long driveway. The fire site was on graded land which looks to be part of the driveway. No other buildings are close by. The land on both sides of the fire site is undeveloped and constitutes several acres. A burning barrel was in place near the fire pile. The fire appeared to be on land associated with the business. A property check was made at the Pierce County assessor's office showing Mr. Bailey's ownership in the vicinity and confirming for the inspector his opinion that the fire was located on appellant's property.

IV

PSAPCA's inspector testified that he talked to two individuals at the scene who said that appellant had told them to start fire. He did not get their names. He assumed they were employees of appellant. No permit for the fire was produced. He thereupon issued a Notice of Violation to appellant's secretary for conducting a fire other than a land clearing or residential fire without prior written approval. On May 31, 1985, the agency issued to appellant a Notice and Order of Civil Penalty relating to the fire on May 2.

The Board received appellant's appeal on June 11, 1985.

V

Appellant's representative at the hearing did not contest the fact of the fire or that it contained the materials described by the PSAPCA's inspector. He advised that he was not at the site of the fire on the day in question until after the Notice of Violation was issued and that he leases part his building to tenants. He said he had not instructed anybody to start a fire. We find his testimony credible on this point.

VI

Appellant also contended that the fire was not on his property. He showed to the satisfaction of the Board that the fire in question (though on a graded rather than an undeveloped area) was actually located beyond his property line as denominated by surveyor's stakes.

The record before us discloses that nothing impeded the access of PSAPCA's inspector to the site of fire.

VII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW

II

RCW 70.94.740 states, in pertinent part:

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1 It is the policy of the state to achieve and  
2 maintain high levels of air quality and to this end  
3 to minimize to the greatest extent reasonably  
4 possible the burning of outdoor fires. Consistent  
5 with this policy, the legislature declares that  
6 such fires should be allowed only on a limited  
7 basis under strict regulation and close control.

### 8 III

9 Section 8.05 of Regulation I entitled "Other Burning" states in  
10 pertinent part:

11 It shall be unlawful for any person to cause  
12 or allow any outdoor fire other than land clearing  
13 burning or residential burning except under the  
14 following conditions:

15 (1) Prior written approval has been issued by  
16 the Control Officer or Board; and

17 (2) Burning is conducted at such times and  
18 under such conditions as may be established by the  
19 Control Officer or Board. (emphasis added)

20 Section 1.07 contains the following definitions:

21 (g) "Land clearing burning" means outdoor fires  
22 consisting of residue of a natural character such  
23 as trees, stumps, shrubbery or other natural  
24 vegetation arising from land clearing projects and  
25 burned on the lands on which the material  
26 originated.

27 (pp) "Residential burning" means small outdoor  
fires consisting of leaves, clippings, prunings and  
wood, so large as it has not been treated by an  
application of prohibitive material or substances,  
and other yard and gardening refuse originating on  
lands immediately adjacent and in close proximity  
to a human dwelling and burned on such lands by the  
property owner or his designee.

### IV

The fire which occurred on May 2, 1985, was neither "land clearing

1 burning" nor "residential burning" as those terms are defined in  
2 Regulation I. Therefore, we conclude that the fire violated Section  
3 8.05 which requires a permit for open burning which does not meet  
4 these definitions. However, we do not believe appellant can be held  
5 legally responsible for this violation.

6 V

7 Section 8.04(b) of Regulation I states:

8 It shall be prima facie evidence that the person  
9 who owns or controls property on which an outdoor  
fire occurs has caused or allowed said outdoor fire.

10 We conclude that this presumption should not operate in this  
11 case. Appellant does not own the property where the fire occurred.  
12 Moreover, since PSAPCA's inspector gained access to the fire site  
13 without interference, we were not convinced that appellant "controls"  
14 such site.

15 VI

16 Even as to one who "controls" property, the presumption of  
17 responsibility for outdoor fires is rebuttable. Such persons can  
18 appropriately be charged because, often, they can be shown to have  
19 created a substantial risk that an unauthorized fire would occur by  
20 the way in which they have managed the property.

21 Here, however, no such risk creation was shown. It was not  
22 demonstrated that Mr. Bailey or his agents built and left unattended  
23 piles of debris in circumstances which can be said to invite a fire to  
24 be started by outsiders. Further, it was not proven that Mr. Bailey  
25 authorized the fire or that his employees conducted it.

26 Final Findings of Fact,  
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1 On this latter point we have only the testimony of PSAPCA's  
2 inspector who related that persons he assumed to be employees of  
3 appellant said to him that they were told to burn the fire.

4 Appellant, appearing pro se, in effect objected to this testimony  
5 on hearsay grounds. PSAPCA's attorney sought to have it admitted as  
6 the admission of a party opponent.

7 We conclude that appellant's objection was well-taken. Respondent  
8 did not prove that the absent persons whose out of court statements  
9 are offered were, in fact, employees of appellant. Lacking such  
10 proof, we cannot hold that they were agents speaking on a matter  
11 within the scope of their employment. Accordingly, the testimony is  
12 not an admission and must be excluded as hearsay. Because of this we  
13 have disregarded it in reaching our conclusions.

#### 14 VII

15 On record before us, appellant was not shown to have "caused or  
16 allowed" the outdoor fire which is the subject of the Notice and Order  
17 of Civil Penalty under appeal.

#### 18 VIII

19 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
20 adopted as such.

21 From these Conclusions of Law, the Board enters this  
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ORDER

PSAPCA Notice and Order of Civil Penalty No. 6276 Notice of Violation issued to Mr. James R. Bailey and the associated civil penalty is vacated.

DATED this 27th day of November, 1985.

POLLUTION CONTROL HEARINGS BOARD

 11/26/85  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Lawyer Member